Supreme Court of the United States

OCTOBER TERM, 1949

No. 55

55

MANUFACTURERS TRUST COMPANY, as Trustee under an Indenture made by the Debtor under date of September 27, 1933, and individually,

Petitioner,

vs.

REGINE BECKER, EMILY K. BECKER and WALTER A. FRIBOURG,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

EDWARD K. HANLON,
15 Broad Street,
New York 5, New York,
Counsel for Petitioner.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

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In view of the fact that we received a page proof of the respondents' brief only late on October 17, 1949, and the brief in final form was not served on us until 12:30 P. M. on October 18 (the day before the argument), no attempt will be made to write a reply brief except in respect to three matters, for which correction will not be found in our principal brief.

I

The respondents' brief seeks throughout to obscure the finding that insolvency existed when the debentures were acquired, this line of thought culminating in the statement that the Referee's finding of insolvency was based on the

terminal result in 1946 when the property was finally sold for $300,000, "since there was no other testimony presented" (Brief, p. 40).

This is completely misleading. As a matter of fact on the trial of the case, when the petitioner sought to prove bankruptcy insolvency by recourse to the debtor's balance sheets, it was expressly conceded by the respondents' present counsel that such insolvency existed during the years in question (R. 59-60).

II

The respondents' brief also makes the contention (pp. 84-86) that there is no authority for the filing of a limitation proceeding by one creditor to reduce the claim of another creditor in an arrangement proceeding under Chapter XI.

The respondents seek to assimilate this case to the old-fashioned composition proceeding, to which it bears no resemblance. While operating under Chapter XI this was purely a liquidation proceeding.

The plan of arrangement provided for the distribution pro rata of the assets of the debtor and made provision for withholding distribution upon claims to which objection should be made.

The order confirming the arrangement was made with these very objections in contemplation, provided for the filing of objections, and went on to state:

> "ORDERED that if as a consequence of the successful prosecution of any objections filed to claims herein there becomes available for distribution to creditors, whose claims have been allowed, a further fund, such fund shall then be distributed to such

> creditors whose claims have been allowed by way of a supplemental dividend;'"*

This order was prepared and submitted by David W. Kahn, Esq., who was then and still is attorney for the debtor and who is also attorney for the respondents and who has handled this entire matter for them.

We further refer the Court to the following statement made by Mr. Kahn in his petition for allowance as attorney for the debtor:

> "Your petitioner expressed the view that any party in interest could object to any of the filed claims in a Chapter XI proceeding just as effectively as in a Chapter X, and that if any valid grounds existed for challenging claims of the so-called insiders, these could be availed of just as readily in the present proceeding as in any other."

III

The respondents' brief also states (p. 4) that there is nothing in the indenture instrument evidencing the issuance of the debentures in question which grants any authority to the petitioner to appear or file any claim in the bankruptcy proceeding, much less to file any objections to the claims of any creditors. In making this statement the brief cites Objector's Exhibit 28 (R. 174), which consisted merely of a paragraph of the indenture, which paragraph had to do with the filing of reports by the debtor. The com-

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* The plan of arrangement, the order confirming the arrangement, and Mr. Kahn's petition for an allowance, here quoted from, are not part of the record certified to this Court, and the references would not be made but for the contention here made by the respondents.

plete indenture was not put in evidence and the agreement, therefore, is entirely improper. We should add, however as a matter of fairness that the indenture gave the trustee in the event of default power in its own name as trustee of an express trust to institute actions and proceedings to protect the rights of the debenture holders, and its claim on behalf of non-proving debenture holders was recognized and permitted to be paid without objection by the respondents' present counsel in his capacity as attorney for the debtor.

It might also be added that the petitioner is a creditor in its own right, although its claim has not yet been liquidated.

CONCLUSION

It is respectfully submitted that the orders of the Court of Appeals for the Second Circuit, the District Court of the United States for the Southern District of New York and the Referee in Bankruptcy should be reversed and that the claims of the respondents (except as to $5,000 of the Fribourg claim) should be limited to the amounts paid by them respectively for their debentures.

Dated: New York, N. Y., October 18, 1949.

Respectfully submitted,

EDWARD K. HANLON,
Counsel for Petitioner.